

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HOWARD WAYNE LEE

§

VS.

§

CIVIL ACTION NO. 4:12-CV-927-Y

§

RICK THALER,
Director, T.D.C.J.
Correctional Institutions Div.

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§

ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND CONCLUSIONS and
ORDER DENYING CERTIFICATE OF APPEALABILITY

Before the Court is the petition for writ of habeas corpus under 28 U.S.C. § 2254 of petitioner Howard Wayne Lee, along with the March 1, 2013 findings, conclusions, and recommendation of the United States magistrate judge. The magistrate judge recommended the case be dismissed for lack of exhaustion, and he recommended that the motions filed by Lee be denied. The magistrate judge gave the parties until March 22 to file written objections to the findings, conclusions, and recommendation. Although no written objections have been filed, Lee filed a response to the magistrate judge's report in which he writes that he has "no objections" to the magistrate judge's report.

Prior to filing his response, Lee also filed a motion for extension of time to file a petition for discretionary review. But this Court has no authority to extend the time for Lee to take particular action in state court. After review and consideration, therefore, the Court concludes that the motion for extension must be denied.¹

¹Lee alleges he has sought relief from his convictions in state court under the procedures of article 11.07 of the Texas Code of Criminal Procedure, which includes provisions for review in the Texas Court of Criminal Appeals. See Tex. Code Crim. App. Art. 11.07(3)(C) and (d)(West Supp. 2012).

The Court has reviewed the pleadings and the record in this case, and has reviewed for clear error the findings, conclusions and recommendation. The Court concludes that, for the reasons stated by the magistrate judge, the petition for writ of habeas corpus should be dismissed.

Therefore, the findings, conclusions and recommendation of the magistrate judge are ADOPTED.

Howard Wayne Lee's motion for summary judgment (doc. 14), motion for pretrial/trial (doc. 25), and motion for extension of time to file a petition for discretionary review (doc. 31), are DENIED.

Howard Wayne Lee's petition for writ of habeas corpus under 28 U.S.C. § 2254 is DISMISSED WITHOUT PREJUDICE, except as to any application of the federal statute of limitations or other federal procedural bar that may apply.²

Certificate of Appealability

Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253.³ Rule 11 of the Rules Governing Section 2254 Proceedings now requires that the Court "must issue or deny a certificate of appealability when it enters a final order

²A one-year statute of limitations is applicable to the filing of non-capital § 2254 habeas corpus petitions in federal court. See 28 U.S.C.A. § 2244(d)(1-4)(West 2006). The statute of limitations is tolled, however, while a properly filed application for state post-conviction or other collateral review is pending. 28 U.S.C.A. § 2244(d)(2)(West 2006).

³See Fed. R. App. P. 22(b).

adverse to the applicant.⁴ The COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."⁵ A petitioner satisfies this standard by showing "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further."⁶

Upon review and consideration of the record in the above-referenced case as to whether petitioner Lee has made a showing that reasonable jurists would question this Court's rulings, the Court determines he has not and that a certificate of appealability should not issue for the reasons stated in the March 1, 2013 Findings, Conclusions, and Recommendation of the United States Magistrate Judge.⁷

Therefore, a certificate of appealability should not issue.

SIGNED March 27, 2013.



TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

⁴RULES GOVERNING SECTION 2254 PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS, RULE 11(a) (December 1, 2009).

⁵28 U.S.C.A. § 2253(c)(2)(West 2006).

⁶*Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003)(citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

⁷See Fed. R. App. P. 22(b); see also 28 U.S.C.A. § 2253(c)(2)(West 2006).